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Abu Samah bin Rahmat v Talasco Insurance Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPPEAL NO R1-11-54 OF 1997
KC VOHRAH J
B 3 NOVEMBER 1999

Insurance *— Motor insurance — Limitation as to use of vehicle — Policy does not cover use of vehicle for hire — Magistrate did not conclusively state that car was hired to third party — Claim refused — Whether wrong in law*

C The claim was for the cost of repairs to the plaintiff's car against the defendant insurance company under an insurance cover. The defendant resisted the claim on the ground that the plaintiff had hired the car to a third person and the insurance policy did not cover such use. The magistrate dismissed the plaintiff's claim and hence the appeal.

D

Held, allowing the appeal:

If the finding of the magistrate had been a finding simpliciter that there was a definite hiring of the car by the plaintiff to the third party, the use of the car for hire would have been excluded by the limitation
E clause from coverage of the insurance policy. However, the magistrate's finding was that it could also have been that the third party had paid the plaintiff some money for permission to use the car. One cannot rule out that the paying of whatever amount by the third party to the plaintiff was on an isolated occasion where there was no element of business about it. The magistrate was wrong to conclude
F that the limitation clause applied (see p 30C–F).

[Bahasa Malaysia summary

Tuntutan adalah untuk kos pembaikan kepada kereta plaintif
G terhadap syarikat insuran defendan di bawah satu perlindungan insuran. Defendan telah menentang tuntutan tersebut atas alasan bahawa plaintif telah menyewakan kereta tersebut kepada pihak ketiga dan polisi insuran itu tidak melindungi penggunaan tersebut. Majistret telah menolak tuntutan plainitf dan justeru itu rayuan telah dibuat.

H

Diputuskan, membenarkan rayuan tersebut:

Jika penemuan majistret merupakan penemuan simpliciter bahawa terdapat sewaan kereta yang pasti oleh plainitf kepada pihak ketiga, penggunaan kereta tersebut untuk disewa telahpun dikecualikan oleh
I fasal pengehadan daripada perlindungan polisi insuran. Namun begitu, penemuan majistret adalah bahawa kemungkinan pihak ketiga telah membayar plaintif sejumlah wang untuk kebenaran mengguna-

kan kereta tersebut. Tiada sesiapa yang boleh menidakkan bahawa pembayaran apa-apa jumlah oleh pihak ketiga kepada plaintif adalah suatu peristiwa yang terasing di mana tiada terdapat apa-apa elemen perniagaan berhubung dengannya. Majistret telah salah membuat kesimpulan bahawa fasal pengehadan tersebut adalah terpakai (lihat ms 30C–F).]

Notes

For cases on motor insurance, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 164–257.

Cases referred to

Albert v Motor Insurers' Bureau [1971] 2 All ER 1345 (refd)
Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corp [1986] 2 MLJ 124 (refd)
Motor Insurers' Bureau v Meanen [1971] 2 All ER 1372 (refd)

Appeal from: Summons No 72–22191–93 (Magistrates' Court, Kuala Lumpur)

Ivan Ho (*Ho & Rakan-Rakan*) for the appellant.
Wan Kuzaini (*Othman Hashim & Co*) for the respondent.

Cur Adv Vult

KC Vohrah J: This is an appeal from the decision of a Kuala Lumpur magistrate who dismissed the action of the plaintiff. The claim was principally for the cost of repairs made to the plaintiff's car against the defendant insurance company under an insurance cover.

The car of the plaintiff was used by his friend, Wan Rosli, on 12 December 1992. While Wan Rosli was driving the plaintiff's car, registration number BCM 6714, along the Kuala Lumpur-Karak highway, one of the tyres burst. Wan Rosli lost control of the car and it collided against the side of the hill. The car was severely damaged and the plaintiff paid for the repairs made to the car.

The claim of RM15,203.81 for repairs to the car and other connected amounts against the defendant insurance company was made under an insurance cover issued for the use of the said car by the defendant. The defendant resisted the claim on the ground that the plaintiff had hired the car to a third person, Wan Rosli, and the insurance policy did not cover such use as its use was excepted from the policy under a clause.

The learned magistrate found as a fact that Wan Rosli had paid money to the plaintiff for the use of the car; she concluded that the plaintiff had hired the car to Wan Rosli or had at least permitted the car to be used by him for an amount of money. She dismissed the plaintiff's claim.

The plaintiff appealed to the High Court.

The first argument of the plaintiff's counsel was that the magistrate was wrong in coming to her finding of fact that the plaintiff had hired his car to Wan Rosli and that, relying on *Malaysia National Insurance Sdn Bhd v*

Malaysia Rubber Development Corp [1986] 2 MLJ 124, the defendant company had failed to bring the case within any of the exceptions of the insurance policy of the defendant insurance company.

I have gone through the notes of proceedings in the magistrates' court and the grounds of decision of the magistrate. The magistrate has carefully gone through the evidence of Wan Rosli who had admitted making a statement (D9) to DW2, an 'insurance adjuster', who had been appointed by the defendant to investigate the accident involving the plaintiff's car. In that statement Wan Rosli had admitted that he had 'rented' the car from the plaintiff for RM60. In evidence, Wan Rosli also stated that 'maybe' he gave 'coffee money' for the loan of the car.

The magistrate, after examining all the evidence including the evidence of Wan Rosli and the evidence of DW2 and the written admission, found, in essence, that money had passed from Wan Rosli to the plaintiff for the use by Wan Rosli of the plaintiff's car and she concluded that Wan Rosli had paid RM60 for the hire of the car or had given him an amount of money so that the plaintiff would allow him to use the car.

Quite clearly, the magistrate did not categorically say that the plaintiff had hired the car. She did not rule out that Wan Rosli had given the plaintiff an amount of money so that the plaintiff would allow him to use the said car. In the context of Wan Rosli's evidence that money was given as 'coffee money' to the plaintiff for the use of the car, I do not see that as being a transaction having the character of a business arrangement in the sense as that stated in *Albert v Motor Insurers' Bureau* [1971] 2 All ER 1345.

Counsel for the plaintiff had argued that one single hiring does not constitute hiring within the meaning of the clause in the insurance policy. I disagree. If there is a definite finding of hiring in the sense of a legally binding contract by the parties then it is caught by the limitations clause. The clause reads:

> Limitations as to use
>
> Use only for social, domestic and pleasure purposes and for the policy holder's business.
>
> The policy does not cover use for hire or reward, ... (see p 116 of appeal record).

Counsel relied on the House of Lord's case of *Albert*.

It will be noticed that the limitations clause in our case under appeal does not state that the limitation is in regard to the carriage of passengers for hire or reward. The *Albert* case revolves on the statutory interpretation of a proviso to s 203(4) of the Road Traffic Act 1960 which restricts the freedom not to insure passengers in the case of a vehicle in which passengers are covered 'for hire or reward.' The House of Lords were unanimous in this judgment that a passenger could be covered for hire or reward even though there was no legally binding contract. Various tests were offered. Lord Donovan spoke of the 'business test' (see 1353) stating:

> The test which I favour, namely, has there been a systematic carrying of passengers for reward which goes beyond the bounds of mere social kindness? — which I may call for short the 'business test'... .

Lord Pearson expressed a somewhat similar approach as to whether arrangements for the carriage of passengers acquire the character of business arrangements.

It will be noted that the House of Lord's case of *Motor Insurers' Bureau v Meanen* [1971] 2 All ER 1372 made reference and relied on the principles in *Albert's* case for the court's decision.

In our case the motor vehicle was used by a third party after he had paid some money to the policy holder of the insurance cover for the car to use it. It seems to me that the test in *Albert*'s case whether the motor vehicle has been used for 'hire or reward' can be applied to our own case although it is not a case of a motor vehicle for carrying passengers for hire or reward as in *Albert*'s case as the test is based on sound principles and reasoning as to what constitutes 'hire or reward' arising from cases relating to insurance policies.

If the finding of the magistrate in our case had been a finding simpliciter that there was a definite hiring of the car by the plaintiff to Wan Rosli in the sense of there being a binding contract between them for the hire I would say that the use of the car for hire would have been excluded by the limitations clause from coverage of the insurance policy and the magistrate would have been right in dismissing the claim. However, her finding was that it could also have been that Wan Rosli had paid the plaintiff some money for permission to use the car. It will be remembered that the magistrate had come to this conclusion because she took into account Wan Rosli's evidence that maybe he did give coffee money for the loan of the car. Since there was this probability which the magistrate had not ruled out, one cannot rule out the view that the paying of whatever amount by Wan Rosli to the plaintiff was on an isolated occasion where there was no element of business about it. In the circumstances the magistrate was wrong to conclude that the limitations clause applied.

In view of the finding of fact that the magistrate had made, the defendant is not entitled to repudiate the claim. I allow the appeal of the plaintiff.

Appeal allowed. Costs here and below to the plaintiff.

Appeal allowed.

Reported by Benjamin Yong